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Judicial Review and the Enumeration of Rights

JUD CAMPBELL*

ABSTRACT

When introducing the Bill of Rights in Congress, James Madison explained that judges would “consider themselves in a peculiar manner the guardians” of those enumerated rights. This famous passage, often treated as authoritative, is conventionally understood to endorse the judicial enforceability of enumerated rights and deny the judicial enforceability of unenumerated rights. Enumeration, in other words, is considered as both a necessary and a sufficient condition for the judicial enforcement of rights against contrary legislation. This Essay disputes each of these orthodox views. Instead, it argues, Madison was commenting on judicial psychology and judicial politics, not judicial duty. Enumeration, in short, would facilitate the enforcement of rights, even if judges were already legally obliged to uphold them. Moreover, this Essay argues, both Madison’s proposed bill of rights and his speech in support were deliberately noncommittal about the legal significance of enumeration. Addressing an audience that had conflicting views on that issue, he drafted and defended the Bill of Rights to obtain support from all sides. Consequently, neither the Bill of Rights nor Madison’s advocacy reveal whether, legally speaking, enumeration is a necessary or sufficient condition for the judicial enforcement of rights against contrary legislation.

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INTRODUCTION

In his speech introducing the Bill of Rights to Congress on June 8, 1789, James Madison explained that one reason for enumerating constitutional rights was that:

independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.¹

This was a minor point in Madison’s speech, which focused on how the proposed amendments would help shape public opinion.² But the passage has taken on major significance in modern conceptions of judicial authority. Scholars and judges routinely interpret Madison’s comments, which they often treat as authoritative, as a defense of the idea that incorporating rights into the Constitution was both a *necessary* and a *sufficient* condition for their judicial enforcement against contrary legislation.³

Madison, however, was defending neither the necessity nor the sufficiency of enumeration. In fact, the Founders were engaged in ongoing debates over the

1. James Madison, Amendments to the Constitution (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES 196, 207 (Charles F. Hobson et al. eds., 1979).

2. See *id.* at 204–05 (amendments would “have a tendency to impress some degree of respect for [rights], to establish the public opinion in their favor, and rouse the attention of the whole community”); see also JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 334–35 (1996) (“The true benefits of a bill of rights [for Madison] were to be found in the realm of public opinion . . .”); Colleen A. Sheehan, *The Measure and Elegance of Freedom: James Madison and the Bill of Rights*, 15 GEO. J.L. & PUB. POL’Y 513 (2017).

3. See, e.g., Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?*, 5 N.Y.U. J.L. & LIBERTY 1, 19–20 (2010); Laurence Claus, *Protecting Rights from Rights: Enumeration, Disparagement, and the Ninth Amendment*, 79 NOTRE DAME L. REV. 585, 590, 609 (2004); Bradford R. Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319, 347–48 (2003); Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113, 175–76 (2003); LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 259 (1999); Raoul Berger, *The Ninth Amendment, As Perceived by Randy Barnett*, 88 NW. U. L. REV. 1508, 1517 (1994); David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 458 (1983); Davis v. Passman, 442 U.S. 228, 241–42 (1979). Akhil Amar notes the intriguing possibility that Madison was speaking about jury decisions, too, and not just judicial review. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 129–30 (1998). Tracking Madison’s comments, this Essay focuses solely on the problem of judicial review—that is, the enforcement of rights *against contrary legislation*. It does not dispute, however, that judges might be said to “enforce” constitutional rules of judicial procedure (e.g., the Seventh Amendment) simply by following those rules (e.g., by convening a civil jury) in absence of any legislative direction one way or the other.

legal significance of enumeration, and Madison drafted and supported the Bill of Rights in a way that stayed neutral in that controversy. For many Federalists in Congress, the enumeration of most rights was legally inconsequential. Rights existed prior to constitutional development; they were sometimes judicially enforceable, sometimes not; and enumeration usually did not change their definition or the means of their enforcement. And even Federalists who disagreed with these views hardly were eager to empower judges to limit federal power. If Madison was asserting the necessity and sufficiency of enumeration as a legal matter, he was misreading his audience.

But Madison's point was more practical: Enumeration was *important* to judging. In part, written declarations proved the existence and fundamentality of certain rights, reducing uncertainty about the law. Enumerating rights also gave courts lexical ammunition when confronting political actors, fostering the willingness of judges to enforce those rights in the first place and helping insulate them from political backlash afterward. In an environment where assertions of judicial review were highly controversial, judges needed all the help they could get to "consider themselves" a safeguard for rights.

When taking this position, Madison was employing a prevalent form of constitutional argument. The Founders often spoke about governmental power in terms of *practical* authority (as a political scientist might) rather than *legal* authority (as lawyers usually do).⁴ After all, constitutional compliance requires concrete human actions, not just abstract legal obligations. And the Founders took this lesson to heart regarding judicial review. When stressing the importance of enumeration to judging, Madison was making a point about judicial psychology and judicial politics, not judicial duty. He was speaking as a political scientist rather than as a lawyer.

But what, then, was Madison saying about the legal necessity or sufficiency of enumerating rights? The answer is simple: Nothing at all. Personally, Madison had no dog in that fight. And he was trying to sell the Bill of Rights to an audience with competing views. Consequently, both in drafting the Bill of Rights and in publicly advocating for its passage, Madison stayed neutral about the legal importance of enumerating rights. Modern interpreters must, therefore, look elsewhere for historical guidance about the relationship between judicial review and the enumeration of rights.

I. EIGHTEENTH-CENTURY RIGHTS

Madison was a late convert to the enumeration cause. Like many Federalists, he had agreed to amendments during the ratification debates as a way to diffuse

4. See Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1178 n.301 (2013). Law professors, too, occasionally think in this way. See, e.g., Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1 (2015); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657 (2011).

the passionate and widespread opposition that had nearly defeated the Constitution.⁵ Even after ratification, however, Madison privately derided declarations of rights as mere “parchment barriers,”⁶ and he became a leading proponent of enumeration only under pressure from his political mentor, Thomas Jefferson, and faced with a bruising electoral campaign in a district drawn to favor his opponent, James Monroe.⁷ Madison’s “grudging acceptance of political necessity,” Jack Rakove observes, “reflected no sudden realization that a national bill of rights would have great practical value.”⁸

But reluctant as his paternity of the Bill of Rights may have been, Madison admirably followed through on his campaign promise to amend the Constitution, and it is worth carefully examining his arguments favoring enumeration. To understand Madison’s comments in context, however, we need to have a better sense of his audience. The Founders, it turns out, spoke about rights and their judicial enforceability in an initially bewildering, but ultimately comprehensible, variety of ways.⁹

A. *Natural Rights*

One type of rights was natural rights, which referred to innate human capacities, like eating, moving, or speaking. “A natural right is an animal right,” Thomas Paine succinctly explained, “and the power to act it, is supposed, either fully or in part, to be mechanically contained within ourselves as individuals.”¹⁰ In general, though, natural rights did not impose determinate limitations on governmental authority. Rather, because of social obligations stemming either from natural law or from an imagined social contract, the government could restrict natural liberty with the consent of the people or their representatives whenever doing so served the public interest.¹¹

Consequently, the retention of natural rights, even in a written bill of rights, usually did not give rise to firm, judicially enforceable limits on legislative power.¹² As Republican lawyer George Hay observed in 1799, if the Speech and Press Clauses simply recognized a natural right of expressive freedom, the First

5. Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 322–28.

6. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES 295, 297 (Robert A. Rutland & Charles F. Hobson eds., 1977).

7. Finkelman, *supra* note 5, at 328–36.

8. RAKOVE, *supra* note 2, at 333; *see also* Finkelman, *supra* note 5, at 304–08. Many of his colleagues thought that Madison was pursuing amendments simply for political reasons. *See* Kenneth R. Bowling, “A Tub to the Whale”: *The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUBLIC 223, 236–37 (1988).

9. Some Founders rejected judicial review entirely, but this Essay focuses on the divergence in views among those who accepted judicial review in some form.

10. Common Sense [Thomas Paine], *Candid and Critical Remarks on Letter I, Signed Ludlow*, PA. JOURNAL AND THE WEEKLY ADVERTISER, June 4, 1777, at 1.

11. *See* Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 92–98 (2017).

12. *Id.* at 106–08.

Amendment would “amount precisely to the privilege of publishing, as far as the legislative power shall say, the public good requires.”¹³ Indeed, even those who had an expansive view of judicial power agreed that judges could not apply their own assessments of the general welfare.¹⁴ Questions “of mere expediency or policy” simply were not amenable to judicial resolution.¹⁵ It is entirely unsurprising, then, that Founding Era judges never directly enforced state constitutional provisions that affirmed the inviolability of the natural rights of life, liberty, and property. Constitutional provisions that lacked legal content, Alexander Hamilton aptly stated in *Federalist No. 84*, “amount[ed] to nothing” as a legal matter.¹⁶

Nonetheless, many Founders affirmed support for a *qualified* judicial application of natural-rights principles. Most straightforwardly, some jurists advocated disregarding laws that clearly departed from the public interest.¹⁷ The enforcement of legislative acts, Virginia Judge Spencer Roane declared in 1809, was not only bounded “by the constitutions of the general and state governments” but “limited also by considerations of justice,” at least when laws reflected a “crying grade of injustice.”¹⁸ But others virulently contested this idea. Judges “could declare an unconstitutional law void” when “plainly” in violation of the Constitution, George Mason remarked at the Philadelphia Convention, but they

13. HORTENSIVS [George Hay], AN ESSAY ON THE LIBERTY OF THE PRESS 38 (Philadelphia, Autora 1799).

14. See *Brutus No. 6* (Dec. 27, 1787), in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 110, 115 (John P. Kaminski et al. eds., 1984).

15. Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 1 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 500, 501 (David B. Mattern et al. eds., 2009); see, e.g., *Trs. of Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58, 88 (1805) (“[T]he judiciary are only to expound and enforce the law and have no discretionary powers enabling them to judge of the propriety or impropriety of laws.”); Madison, *supra* note 1, at 205 (arguing that “it is for [Congress] to judge of the necessity and propriety” of laws); Virginia Ratification Convention Debates (June 10, 1788) (remarks of James Monroe), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1092, 1112 (John P. Kaminski et al. eds., 1990) (claiming that Congress would be “not restrained or controuled from making any law, however oppressive in its operation, which they may think necessary to carry their powers into effect”); Pennsylvania Ratification Convention Debates (Dec. 4, 1787) (remarks of James Wilson), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 465, 468 (Merrill Jensen ed., 1976) (“The powers of Congress are unlimited and undefined. They will be the judges of what is *necessary* and *proper*.”); *An Old Whig No. 2*, PHILA. INDEPENDENT GAZETTEER, Oct. 17, 1787, reprinted in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 399, 402 (John P. Kaminski et al. eds., 1981) (“[F]rom the nature of their power [members of Congress] must necessarily be the judges, what laws are necessary and proper.”). When participating in a council of revision, however, judges could venture beyond these limitations to address questions of propriety. See *infra* note 19.

16. THE FEDERALIST No. 84, at 580 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Instead, Hamilton continued, “whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.” See *id.*

17. See Campbell, *supra* note 11, at 107–08.

18. *Currie’s Adm’rs v. Mut. Assurance Soc’y*, 14 Va. (4 Hen. & M.) 315, 346, 350 (1809) (opinion of Roane, J.); see also *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.) (“There are certain vital principles . . . which will determine and over-rule an *apparent and flagrant* abuse of legislative power . . .”); *Bank of State v. Cooper*, 10 Tenn. (2 Yer.) 599, 603 (Special Ct, 1831) (opinion of Green, J.) (“Some acts, although not expressly forbidden, may be against the *plain and obvious* dictates of reason.” (emphasis added)).

had to give “free course” to all other laws, “however unjust oppressive or pernicious.”¹⁹

The most common position among American legal elites fell between these extremes. Drawing from their understanding of Edward Coke’s 1610 decision in *Dr. Bonham’s Case*,²⁰ the Founders widely agreed that judges should, when possible, construe statutes to comport with the public interest.²¹ Alexander Hamilton, for instance, took this view in his famous exposition of judicial authority in *Federalist No. 78*. After explaining that judges would “declare all acts contrary to the manifest tenor of the constitution void,”²² Hamilton noted the importance of judicial independence for the protection of natural rights:

But it is not with a view to infractions of the [C]onstitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws.²³

The quintessential abridgment of natural rights by the government, it bears emphasis, was a deprivation of liberty, or property effected by an unjust or partial law.

Meanwhile, a narrower class of natural rights imposed more determinate restrictions on governmental authority. These “r[i]ghts of the mind,” as Nathaniel Chipman put it, offered protection for the freedom of religious exercise and

19. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 78 (Max Farrand ed., Yale Univ. Press rev. ed. 1966) (1911) (remarks of George Mason); *see also, e.g., Calder*, 3 U.S. at 399 (opinion of Iredell, J.) (“[T]he Court cannot pronounce [a law] to be void, merely because it is, in their judgment, contrary to the principles of natural justice.”). Though he did not accept inherent judicial authority to enforce natural law, Mason supported a council of revision enabling federal judges to “giv[e] aid in preventing every improper [state] law. Their aid will be the more valuable as they are in the habit and practice of considering laws in their true principles, and in all their consequences.” 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 78; *see also Edmund Randolph’s Suggestion for Conciliating the Small States* (July 10, 1787), in 3 RECORDS OF THE FEDERAL CONVENTION 55–56 (proposing “that any individual conceiving himself injured or oppressed by the partiality or injustice of a law of any particular State may resort to the National Judiciary, who may adjudge such law to be void, if found contrary to the principles of equity and justice”).

20. *Dr. Bonham’s Case*, 77 Eng. Rep. 638 (1610); *see generally* R.H. Helmholz, *Bonham’s Case, Judicial Review, and the Law of Nature*, 1 J. LEGAL ANALYSIS 325 (2009); PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 622–30 (2008).

21. *See* HAMBURGER, *supra* note 20, at 339–57; LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 20–24 (2004).

22. THE FEDERALIST NO. 78, *supra* note 16, at 524 (Alexander Hamilton).

23. *Id.*; *see, e.g., Ham v. McClaws*, 1 S.C.L. (1 Bay) 93, 98 (S.C. Sup. Ct. 1789) (“We are . . . bound to give such a construction to this enacting clause . . . as will be consistent with justice, and the dictates of natural reason, though contrary to the strict letter of the law . . .”).

the right to make well-intentioned statements of one's thoughts,²⁴ limiting both the ends and the means of governmental authority.²⁵ But, once again, enumeration did not seem to matter. Everyone had a right "of speaking and writing their minds—a right, of which no law can divest them," Congressman John Vining observed before the First Amendment was ratified.²⁶ This right, Fisher Ames chimed in, was "an unalienable right, which you cannot take from them, nor can they divest themselves of," and any abridgment would therefore be "nugatory."²⁷ The Founders often made similar claims about the inalienability of

24. NATHANIEL CHIPMAN, *SKETCHES OF THE PRINCIPLES OF GOVERNMENT* 174 (Rutland, J. Lyon 1793) (contrasting "[r]ights of the mind" with other natural rights); see Jud Campbell, *Natural Rights and the First Amendment*, YALE L.J. (forthcoming); see also, e.g., JOHN WITHERSPOON, *Lectures on Moral Philosophy: Lecture VIII*, in 3 *THE WORKS OF THE REV. JOHN WITHERSPOON* 405, 408 (Philadelphia, William W. Woodward 2d ed., rev. 1802) (mentioning "a right over [man's] own knowledge, thoughts, &c" as an inalienable right). The Founders often referred to these rights as "unalienable" natural rights. See Campbell, *supra* note 11, at 97 n.61. Confusingly, the Founders also used the term "unalienable" to describe a broad class of rights—including the rights to life, liberty, and property—that simply could not be divested to the control of a monarch. These rights, however, *could* be regulated in the public interest. See *id.* at 97–98; see, e.g., North Carolina Ratification Convention Debates (July 24, 1788) (remarks of David Caldwell), in 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA IN 1787*, at 3, 40 (Jonathan Elliot ed., 2d ed., Washington, D.C., n. pub. 1836) ("Unalienable rights ought not to be given up, if not necessary.").

25. A great deal of scholarly confusion about natural rights stems from the fluid and often deceptive ways that Federalists discussed these rights throughout the ratification debates. Federalists usually treated the surrender or preservation of natural rights in terms of the *ends* of governmental power. See, e.g., *The Report of the Constitutional Convention* (Sept. 17, 1787), in 13 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 15, at 199, 211 ("It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved . . ."); Letter from James Madison to George Washington (Dec. 5, 1789), in 12 *PAPERS OF JAMES MADISON*, *supra* note 1, at 458, 459 ("If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended."). In other words, "parting with natural rights" was sometimes lexically equivalent to "the surrendering of a power to controul our natural rights." Theophilus Parsons, *Essex Result* (1778), in THEOPHILUS PARSONS, *MEMOIR OF THEOPHILUS PARSONS* 359, 365 (Boston, Ticknor & Fields 1861). And in this limited sense, withheld powers and retained natural rights were flip sides of the same coin. Cf. Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1292 (1990). But "unsurrendered" natural liberty could still be regulated pursuant to other valid *ends* of governmental authority. "The absence of an enumerated power over the liberty of locomotion, for instance, meant that the federal government lacked *plenary* authority to restrict individual movement in the public interest," but Congress could still "restrict individual movement when pursuing [its enumerated] powers." Campbell, *supra* note 11, at 103. By contrast, "rights of the mind" were unique because the government lacked authority to abridge these rights even when based on a claimed public benefit. See *id.* at 92, 97.

26. Congressional Debates (Jan. 21, 1791) (remarks of Rep. John Vining), in 14 *DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1789–MARCH 3, 1791*, at 340 (William Charles DiGiacomantonio et al. eds., 1995).

27. *Id.* at 342 (remarks of Rep. Fisher Ames). Vining and Ames opposed a proposal "to prevent" tax collectors from "interfering, either directly, or indirectly, in elections, further than giving their own votes, on penalty of forfeiting their offices." *Id.* at 339 (remarks of Rep. James Jackson). Apparently nobody in Congress asserted that the freedom of speech was unrecognized because the First Amendment was not yet in effect. Moreover, with power to regulate federal employment undisputed, this debate illustrates how *inalienable* rights were *not* the inverse of powers. Cf. *supra* notes 24–25, *infra* note 104 and accompanying text.

religious freedom.²⁸

In short, with respect to *natural* rights, enumeration was not a *necessary* or *sufficient* condition for their judicial enforcement. Some Founders saw judges as an important backstop for the defense of natural rights, even though these “rights” generally lacked determinate legal content. Yet, as Roane’s and Hamilton’s statements plainly reveal, this authority was derived not from the constitutional enumeration of natural rights but instead from background principles of social-contract theory and of judicial obligation. Enumeration did not, as a legal matter, seem to affect the judicial enforceability of natural rights.

B. Positive Rights

In contrast to natural rights, positive rights were rights defined in particular relation to governmental authority, like the right to a jury trial, the rule against press licensing, and the ban on *ex post facto* laws. These rights were often enforceable in court, and some of them—namely, *fundamental* positive rights—even had the status of supreme law. Positive rights with “constitutional or fundamental” status, Federal Farmer explained, could not “be altered or abolished by the ordinary laws.”²⁹ Other positive rights, though, were “mere legal rights” that were “such as individuals claim under laws which the ordinary legislature may alter or abolish at pleasure.”³⁰ A crucial issue, then, was identifying which positive rights were “fundamental.”

Many Founders thought that fundamental positive rights were identifiable by looking to custom, without any need for constitutional enumeration. During the colonial period, after all, Americans had widely accepted the existence of a customary constitution that guaranteed a variety of individual rights.³¹ “Like other forms of customary law,” Larry Kramer observes, “the content of this constitution was uncertain and open-ended,” but “[i]t did not follow that nothing was fixed.”³² The fundamentality of some rights, like the protection of a jury trial and the rule against *ex post facto* laws, was well established.³³

Consequently, even once Americans began to enact written constitutions, about half of the states did not adopt bills of rights. Enumerating *natural* rights was unnecessary, many Founders thought, because the people retained full control, through their legislative representatives, over regulations of natural

28. See, e.g., Parsons, *supra* note 25, at 371 (“[I]n entering into political society, [man] surrendered this right of controul over his person and property, (with an exception to the rights of conscience) to the supreme legislative power, to be exercised by that power, *when the good of the whole demanded it.*”); N.H. CONST. of 1784, pt. 1, art. 4 (“Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE.”).

29. *Federal Farmer No. 6* (1787), reprinted in 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 979, 983–84 (John P. Kaminski et al. eds., 2004).

30. *Id.* at 984.

31. The leading study is JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 4 vols. (1986-1993). For a shorter discussion, see KRAMER, *supra* note 21, at 9–34.

32. KRAMER, *supra* note 21, at 14.

33. See Campbell, *supra* note 11, at 106.

liberty.³⁴ The natural rights of life, liberty, and property were thus preserved through republicanism.³⁵ And since an imagined social contract preserved both the inalienable right of conscience and the host of fundamental positive rights that individuals received “as a consideration for the [natural] rights . . . surrendered,”³⁶ it was unnecessary to enumerate these rights in a constitution. These more determinate constraints on legislative authority were already guaranteed.

Nor did this view recede as Americans began adopting declarations of rights in the 1770s and 1780s. Instead, bills of rights were *declaratory* documents, reaffirming those positive rights *already* known to be fundamental, with mentions of some natural rights as well.³⁷ “The amendments reported are a declaration of rights,” Roger Sherman explained in the First Congress. “[T]he people are secure in them, whether we declare them or not.”³⁸ But that did not make enumeration pointless. Rather, writing down rights served an educative function and gave these rights “a degree of explicitness and clarity.”³⁹

By the late 1780s, however, enumerating rights was not always just a declaratory exercise. Constitutional enumeration also had come to provide an avenue for recognizing the fundamentality of positive rights *not* supported by custom. In other words, incorporating non-fundamental positive rights into a constitution offered a way of elevating those rights to constitutional status.⁴⁰ In the late eighteenth century, for instance, many Americans did not perceive there to be customary bans on bills of attainder, religious tests for holding public office, and governmental interference with contracts.⁴¹ If Americans wanted to

34. See *id.* at 96–98; see, e.g., THE FEDERALIST NO. 84, *supra* note 16, at 578 (Alexander Hamilton) (“[I]n strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations.”).

35. See Campbell, *supra* note 11, at 96–98.

36. Parsons, *supra* note 25, at 367.

37. See, e.g., John Phillip Reid, *The Authority of Rights at the American Founding*, in THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND 67, 97 (Barry Alan Shain ed., 2007); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 295 (1969); see also Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 197 (“Our written Constitution presupposed an established set of fundamental rights not *created* by the Constitution but *protected* or *preserved* by it.”).

38. 1 ANNALS OF CONG. 715 (1789) (Joseph Gales ed., 1834) (remarks of Rep. Roger Sherman); see also, e.g., Virginia Ratification Convention Debates (June 16, 1788) (remarks of George Nicholas), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1334 (John P. Kaminski et al. eds., 1993) (“A Bill of Rights, is only an acknowledgement of the pre-existing claim to rights in the people. They belong to us as much as if they had been inserted in the Constitution.”).

39. KRAMER, *supra* note 21, at 51.

40. See *Federal Farmer No. 6*, *supra* note 29, at 984 (fundamental positive rights included rights “so strengthened by long usage as not to be repealable by the ordinary legislature” and rights claimed “under the solemn compacts of the people, as constitutions”); *Federal Farmer No. 16* (1788), reprinted in 20 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 29, at 1051, 1057–58 (fundamental positive rights are recognized “under compacts, or immemorial usage”).

41. See, e.g., *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (opinion of Paterson, J.) (“I consider it as a sound political proposition, that wherever the legislative power of a government is *undefined*, it includes the judicial and executive attributes.”); Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674,

constitutionally prohibit these types of laws, therefore, they needed to enact constitutional rules against them.

When positive rights were recognized as fundamental, whether through custom, constitutional enumeration, or both,⁴² these rights were usually judicially enforceable.⁴³ Indeed, many of these rights, like the right to a jury, dealt with issues of judicial process.⁴⁴ And, when recognized as fundamental, they typically operated as supreme law, superseding any contrary legislation. Should Congress attempt to infringe the people's rights, Theophilus Parsons declared in the Massachusetts Ratification Convention, "the act would be a nullity, and could not be enforced."⁴⁵ An assortment of Founding Era judicial decisions seem to validate that view with respect to both customary and enumerated rights.⁴⁶

At the same time, however, a number of Americans in the late 1780s began to suggest that enumeration might be a *necessary* condition for the preservation of fundamental positive rights.⁴⁷ These suggestions were rarely made in particular reference to *judicial* enforcement.⁴⁸ But since so many of those rights were

681 (1987) ("[I]n 1787 . . . 'non-Christians' could not hold public office anywhere in the states, except perhaps in Virginia."); 1 ANNALS OF CONG. (1790), *supra* note 38, at 1210 (remarks of Rep. Theodore Sedgwick) (acknowledging governmental authority "to interfere with contracts, public and private" when done to promote "the public welfare"). But see THE FEDERALIST NO. 44, *supra* note 16, at 301 (James Madison) ("Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation.").

42. Enumeration, after all, could remove uncertainty about the fundamentality of particular positive rights, even if the weight of legal authority already supported that view.

43. Americans who rejected Parliamentary supremacy sometimes asserted the judicial enforceability of customary fundamental rights even during the Colonial period. See HAMBURGER, *supra* note 20, at 274–78.

44. See *Federal Farmer No. 16*, *supra* note 40, at 1057 (noting a variety of "particular essential rights the people are entitled to in [judicial] proceedings").

45. Massachusetts Ratification Convention Debates (Feb. 5, 1788) (remarks of Theophilus Parsons), in 6 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1450 (John P. Kaminski et al. eds., 2000).

46. See generally Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987); Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171 (1992); William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005).

47. See *Federal Farmer No. 16*, *supra* note 40, at 1057–58 ("[I]t will by no means follow, that [the people] will be entitled to [fundamental positive rights] in the federal courts, and have a right to assert them, unless secured and established by the constitution or federal laws," because "it is doubtful, at least, whether [fundamental positive rights] can be claimed under immemorial usage in this country."); George Mason, *Objections to the Constitution of Government Formed by the Convention*, in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 15, at 43 ("Nor are the People secured even in the Enjoyment of the Benefits of the common-Law; (which stands here upon no other Foundation than it's [sic] having been adopted by the respective Acts forming the Constitutions of the several States.);"); see also Jack N. Rakove, *The Dilemma of Declaring Rights*, in THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND, *supra* note 37, at 181, 193 (noting the "positivist" dimension of Anti-Federalist arguments).

48. See RAKOVE, *supra* note 2, at 323; cf. *An Old Whig No. 2*, *supra* note 15, at 402 ("[W]ho can overrule [Congress's] pretensions?—No one, unless we had a bill of rights to which we might appeal, and under which we might contend against any assumption of undue power and appeal to the judicial branch of the government to protect us by their judgements.").

about judicial procedures, and since preserving rights was an obvious precondition for their judicial protection, the positivist dimension of these arguments planted the seeds for the idea that rights had to be constitutionally enumerated before they could trump contrary legislation.⁴⁹

In short, with respect to *positive* rights, enumeration typically was a *sufficient* condition for judicial enforcement,⁵⁰ but whether it was also a *necessary* condition was more in doubt. For rights that were not customarily recognized as fundamental, enumeration was clearly necessary. For those rights that were part of the customary constitution, however, many Founders denied the necessity of enumeration, although not everyone agreed.

II. THE PHILADELPHIA CONVENTION

An episode during the Philadelphia Convention of 1787 illustrates how the Framers applied these principles when drafting the Constitution. The story begins with a discussion about whether to enumerate certain rights.

In the midst of debates over congressional powers, Elbridge Gerry and James McHenry moved for a clause banning federal bills of attainder and ex post facto laws.⁵¹ Gouverneur Morris “thought the precaution as to ex post facto laws unnecessary; but essential as to bills of attainder.”⁵² Oliver Ellsworth enthusiastically agreed. “[T]here was no lawyer, no civilian,” the Connecticut jurist explained, “who would not say that ex post facto laws were void of themselves. It cannot then be necessary to prohibit them.”⁵³ James Wilson chimed in, too, noting that a constitutional ban on ex post facto laws would suggest that the Framers were “ignorant of the first principles of Legislation,” or at least were “constituting a Government which will be so.”⁵⁴ No one, however, denied that it was essential to enumerate a prohibition against bills of attainder, and that proposal passed without dissent.⁵⁵

49. See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (opinion of Iredell, J.).

50. Two caveats are in order. First, for those Founders who denied judicial authority to determine the constitutionality of statutes, enumeration obviously was not a sufficient condition for judicial enforcement. Second, the scope of enumerated rights might still, in some cases, lack the requisite clarity for judicial enforcement. See *Calder*, 3 U.S. at 399 (opinion of Iredell, J.) (“[A]s the authority to declare [a statute] void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case.”); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140–42 (1893) (discussing the clarity requirement in Founding Era judicial review); Christopher R. Green, *Clarity and Reasonable Doubt in Early State–Constitutional Judicial Review*, 57 S. TEX. L. REV. 169, 172–83 (2015) (same); John McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 880–904 (2016) (same).

51. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 19, at 375. It is important to keep in mind that Madison’s notes from late in the Convention are particularly unreliable. See MARY SARAH BILDER, MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION 141–47 (2015).

52. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 19, at 376.

53. *Id.*; see also *id.* (“Doctr. Johnson thought the clause unnecessary, and implying an improper suspicion of the National Legislature.”).

54. *Id.*

55. *Id.* (“The first part of the motion relating to bills of attainder was agreed to nem[ine] contradicente.”).

The weight of opinion among the Framers seemed to be decidedly against enumerating a ban on ex post facto laws. So why did they add one anyway? One possibility is the *educative* function that declarations of rights served in guiding political officials and shaping public opinion—goals that undergirded most calls for a declaration of rights during the ensuing ratification controversy.⁵⁶ That point is worth emphasizing: The leading reason for enumerating rights in the late 1780s had nothing to do with courts or judges.

But at the end of the discussion, Hugh Williamson of North Carolina made an intriguing argument relating to the *legal* enforcement of rights. “Such a prohibitory clause is in the Constitution of N. Carolina,” Williamson announced, “and tho it has been violated, it has done good there & may do good here, because the Judges can take hold of it.”⁵⁷ Perhaps enumeration, in other words, would facilitate judicial review.

Indeed, a significant confrontation over the authority of judges to rule on the constitutionality of legislation had recently unfolded in North Carolina. Williamson was a bit confused about the details. The case, *Bayard v. Singleton*, actually raised the question whether a procedural bar in loyalist-property suits violated the right to trial by jury—not the ban on ex post facto laws.⁵⁸ But Williamson’s point was still valid. The presence of an enumerated jury right in North Carolina’s declaration of rights gave the judges in *Bayard* something to “take hold of” when striking down legislation.⁵⁹

But was Williamson saying that enumeration was legally necessary? The historical record is unclear. During the *Bayard* proceedings, the judges never questioned the judicial enforceability of certain unenumerated positive rights.⁶⁰ Nor did Williamson or any of his colleagues in Philadelphia rebut Ellsworth’s

56. See *supra* note 2 and *infra* notes 77–78, and accompanying text.

57. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 19, at 376.

58. See HAMBURGER, *supra* note 20, at 458. Williamson can be forgiven for his confusion. Both the dissenters in the North Carolina legislature and the lawyers for the plaintiff made a variety of arguments against the law, including the position that it was an ex post facto law. See *id.* at 452 (describing the lawyers’ position); 17 THE STATE RECORDS OF NORTH CAROLINA 419 (statement of legislative dissenters) (Walter Clark ed., Goldsboro, N.C., Nash Bros. Book & Job Printers 1899). The dissenters had also derided the law as “a violation even of the forms of Justice” and thus was, “as an unconstitutional law, . . . nugatory.” *Id.* at 420. Instead, they insisted, all citizens must enjoy “the known and established rules of Justice, which protect the property of all Citizens equally.” *Id.* at 421.

59. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 19, at 376. Notably, Williamson and his friends in North Carolina paid little attention to the hortatory phrasing of the Civil Jury Clause, which declared that the civil jury “is one of the best securities of the rights of the people, and *ought* to remain sacred and inviolable.” N.C. Decl. of Rights of 1776, art. XIV (emphasis added). This provides yet another useful reminder that “close-reading textualism is a poor guide to original meaning.” William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 MICH. L. REV. 487, 518 (2007). Scholars, however, routinely point to the hortatory phrasing of bills of rights in the Founding Era as evidence of their non-enforceability. See Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights “Retained” by the People*, 16 S. ILL. U. L.J. 267, 303 n.101 (1992) (collecting sources).

60. See Treanor, *supra* note 46, at 480 (“[T]he court does not suggest that only statutes in that category [of straightforward application of constitutional text] can be properly found unconstitutional.”).

claim that “ex post facto laws were void of themselves.”⁶¹ After the Convention, in fact, Williamson embraced the standard Federalist position that enumeration was unnecessary. It was “perfectly understood,” he insisted, “that under the Government of the Assemblies of the States, and under the Government of the Congress, every right is reserved to the individual, which he has not expressly delegated to this, or that Legislature,” thus obviating any need for “a second Declaration of Rights.”⁶² To be sure, Williamson may have changed his mind, or he might have been arguing disingenuously to advance the ratification cause. But perhaps his earlier comments in Philadelphia were less about the legal necessity of enumeration and more about judicial politics.

North Carolina’s experience, after all, revealed that enumeration served a useful purpose during litigation, even if it was not legally essential. As occurred in other states, the exercise of judicial review in North Carolina was highly controversial, leading both to impeachment proceedings against the presiding judges and to a grand jury presentment of Bayard’s lawyer, William Richardson Davie, for having asserted the existence of such a controversial power.⁶³ And in this precarious environment, judges with textual support for upholding rights were naturally more inclined to disregard legislation and less likely to suffer backlash. Enumerating rights, one might say, would give judges something to “take hold of.”

Evidence shows that Williamson was attentive to these political challenges. Only a few months after the Philadelphia Convention adjourned, he defended the creation of federal courts because it was “at least possible that some State may be found in this Union, disposed to break the Constitution,” and “the Courts of the offending States would probably decide according to its own laws.”⁶⁴ Doing so, of course, would clearly violate the Supremacy Clause. But Williamson was focused on *practical* barriers to judicial review. Even when their legal obligations were clear, he still feared that judges would fail to apply governing law.

Nor was Williamson alone in these concerns. The judiciary had a “natural feebleness,” Alexander Hamilton explained in *Federalist No. 78*, and was “in continual jeopardy of being overpowered, awed or influenced by [the] coordi-

61. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 19, at 376.

62. Hugh Williamson, Speech at Edenton, N.C., in 16 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 201, 202 (John P. Kaminski et al. eds., 1986).

63. Hamburger rightly notes that some supporters of impeachment criticized the judges for initially *failing* to hold the statute unconstitutional. See HAMBURGER, *supra* note 20, at 455. On Davie’s impeachment, see PA. PACKET, July 1, 1786, at 2 (“Col. Davie, particularly, sustained those arguments, with so much warmth and energy, that the grand jury, considering his free investigation of the Assembly’s conduct as a criminal step, in its nature injurious to, destructive of, and against the peace and dignity of the State, presented him on the 27th ult. But the judges, either more indulgent, or better acquainted with the rights of a lawyer defending his client, or an unprejudiced citizen the liberty of his country, discharged him.”). On backlash elsewhere, see KRAMER, *supra* note 21, at 64–69.

64. Williamson, *supra* note 62, at 204.

nate branches.”⁶⁵ Promoting judicial independence was thus essential.⁶⁶ Even when politicians lacked widespread public support, pushing back against the political branches would be challenging. “But it is easy to see,” Hamilton continued, “that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the [C]onstitution, where legislative invasions of it had been instigated by the major voice of the community.”⁶⁷

But the structural protection of judicial life tenure was not enough. The Framers also expressly declared the judicial duty to follow the Constitution against countervailing state law, even though they generally accepted judicial review as an inherent facet of judging.⁶⁸ First, they provided in the Supremacy Clause that the Constitution would become “the supreme Law of the Land.”⁶⁹ As a choice-of-law provision, that Clause required state and federal judges to apply the Constitution against contravening state law. Supreme law, after all, necessarily supersedes inferior law. Yet the Framers said more. Not only was the Constitution “the supreme Law of the Land,” but also “the Judges in every State [were] bound thereby.”⁷⁰

Almost without question, that provision was legally redundant.⁷¹ The Judges Clause was “but an expression of the necessary meaning of the former clause,” Joseph Story aptly remarked in his famous *Commentaries on the Constitution of the United States*.⁷² But the Clause was still tremendously important. “The very circumstance, that any objection was made [to judicial review],” Story explained, “demonstrated the utility, nay the necessity of the clause, since it removed every pretence, under which ingenuity could, by its miserable subterfuges, escape from the controlling power of the constitution.”⁷³ Story was exactly right.⁷⁴

65. THE FEDERALIST No. 78, *supra* note 16, at 523 (Alexander Hamilton).

66. *Id.* at 526–27.

67. *Id.* at 528.

68. See HAMBURGER, *supra* note 20, at 327–57, 404–61.

69. U.S. CONST. art. VI, cl. 2.

70. *Id.*

71. See Campbell, *supra* note 4, at 1163–64. Some legal observers have asserted that the Judges Clause grants federal power to commandeer state judges, *see, e.g.*, Printz v. United States, 521 U.S. 898, 907 (1997), but that interpretation reads the Clause as responding to a nonexistent problem. To the extent that one cares, the evidence of Framers’ intent on this issue is indisputable. Prior to being shorted by the Committee of Style, the Clause stated that “the Judges in the several States shall be bound thereby in their Decisions, any Thing in the Constitutions or laws of the several States to the Contrary notwithstanding.” 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 19, at 169 (emphasis added). Constitutional surplusage, we must recall, was nothing unusual. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1721 (2012).

72. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 697 (Boston, Hilliard, Gray, & Co. 1833).

73. *Id.*

74. See KRAMER, *supra* note 21, at 75 (“[The Judges Clause] answered the leading objection to judicial review, which was that judges had not been authorized by the people to make such decisions.”);

The Constitution itself, in other words, demonstrated the Framers' belief that enumeration was important for facilitating judicial review, even when it was legally unnecessary.⁷⁵ In this instance, the Judges Clause provided state judges with something to "take hold of" in their assertion of judicial authority, even though that legal duty was already implicit in the Supremacy Clause. Might Madison have defended the enumeration of rights using the same rationale?

III. THE BILL OF RIGHTS

The omission of a bill of rights provided a rallying cry for opponents of ratification, whom Federalists pejoratively labeled as "Anti-Federalists."⁷⁶ George Mason, for instance, mentioned the absence of rights at the top of his widely circulated criticisms of the proposed Constitution. "There is no Declaration of Rights," Mason lamented, "and the Laws of the general Government being paramount to the Laws & Constitutions of the several States, the Declarations of Rights in the separate States are no Security. Nor are the People secured even in the Enjoyment of the Benefits of the common-Law."⁷⁷ Opponents of ratification echoed these complaints throughout the ensuing months, eventually obtaining promises from Federalists that they would amend the Constitution soon after the new government began its operations.

Once the First Congress convened, however, Federalists showed little interest in passing amendments. Madison pushed more vigorously. But he, too, revealed a lingering ambivalence about enumeration. Creating a bill of rights would have a "salutary tendency," Madison cautiously explained in his introductory speech, and might "tend to prevent the exercise of undue power."⁷⁸ For instance, enumerating rights might "establish the public opinion in their favor" and "be one mean to controul the majority from those acts to which they might be otherwise inclined."⁷⁹ This discussion was all about the political and educative benefits of enumeration, not its legal consequences.

Madison then shifted toward a more legalistic argument, but he carefully maintained an equivocal tone. The Necessary and Proper Clause, he explained,

RAKOVE, *supra* note 2, at 175 ("[T]he supremacy clause marked an attempt to incorporate a principle of judicial review into all the state governments by the unilateral fiat of the Constitution.").

75. Notably, the Judges Clause involved an issue of great concern to the Framers—namely, *state* adherence to the supremacy of federal law. When it came to a suggestion late in the convention to pass a bill of rights with regard to *federal* power, however, the Framers soundly rejected the proposal. *See* Bowling, *supra* note 8, at 225.

76. *See, e.g.*, 1 ANNALS OF CONG., *supra* note 38, at 731 (remarks of Rep. Elbridge Gerry) ("Those who were called anti-federalists at that time, complained that they had injustice done them by the title, because they were in favor of a Federal Government, and the others were in favor of a national one."). *See generally* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788 (2010); SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828 (1999).

77. Mason, *supra* note 47, at 43.

78. Madison, *supra* note 1, at 196, 203–04.

79. *Id.* at 204–05.

gave Congress “certain discretionary powers with respect to the means” for exercising enumerated powers, and this authority “*may* admit of abuse to a certain extent.”⁸⁰ “[A]n instance which . . . proves that this *might* be the case,” Madison commented, was the power to collect revenue, which Congress might invoke to authorize general warrants.⁸¹ “*If* there was reason for restraining the state governments from exercising this power,” he noted, still speaking conditionally, “there is like reason for restraining the federal government.”⁸² His equivocation was telling.

Madison then explicitly “admit[ted] the force” of the standard Federalist position that “a bill of rights is not necessary.”⁸³ Yet again, however, he returned to the idea that enumeration would have, “to a certain degree, a *salutary effect* against the abuse of power.”⁸⁴ “If they are incorporated into the constitution,” he remarked,

independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.⁸⁵

“Besides this security,” Madison then asserted, there was “a great probability” that enumerated rights “would be inforced” by state legislatures who were “able to resist with more effect every assumption of power than any other power on earth can do.”⁸⁶

According to the conventional view, Madison was explicitly endorsing the judicial enforceability of all enumerated rights while implicitly denying the constitutional status of all unenumerated rights.⁸⁷ “Madison’s point,” Laurence Claus asserts, “was that enumeration makes rights judicially enforceable That argument would not have been available to him had he actually contemplated, or thought his audience contemplated, that courts would proclaim and enforce federal constitutional rights anyway.”⁸⁸ Scholars also often tie Madison’s congressional speech to Thomas Jefferson’s earlier comment that one reason for declaring rights was “the legal check which it puts into the hands of the

80. *Id.* at 205 (emphasis added).

81. *Id.* (emphasis added).

82. *Id.* at 206 (emphasis added).

83. *Id.*

84. *Id.* (emphasis added).

85. *Id.* at 206–07.

86. *Id.* at 207.

87. See *supra* note 3 (collecting sources). Among these authors, Michael McConnell asserts that judges should nonetheless respect retained natural rights by equitably interpreting statutes to avoid conflicts with those rights. See McConnell, *supra* note 3, at 22–23.

88. Claus, *supra* note 3, at 609.

judiciary,”⁸⁹ suggesting a legal authority that would not otherwise exist.

Even scholars who focus on Madison’s political and educative rationales for declaring rights do not dispute the legal character of his particular comment about judicial review. Jack Rakove, for instance, emphasizes the depth of Madison’s skepticism about the judicial enforcement of rights. “Madison,” he observes, “did not expect the adoption of amendments to free judges to act vigorously in defense of rights.”⁹⁰ But Rakove never disclaims the ostensibly positivist implications of Madison’s statement.⁹¹ A few other scholars have suggested that Madison was making a practical argument,⁹² but these treatments are cursory and still often suggest that Madison was making a point about judicial duty.⁹³

89. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 14 THE PAPERS OF THOMAS JEFFERSON 659, 659 (Julian P. Boyd ed., 1958). For the development of Madison’s ideas, see Jack N. Rakove, *Judicial Power in the Constitutional Theory of James Madison*, 43 WM. & MARY L. REV. 1513, 1531–32 (2002).

90. RAKOVE, *supra* note 2, at 335; see also Rakove, *supra* note 88, at 1532 (“[T]he idea that Madison viewed [judicial enforcement of rights] with much optimism seems unlikely.”); cf. Ralph L. Ketcham, *James Madison and Judicial Review*, 8 SYRACUSE L. REV. 158 (1957) (arguing that Madison vacillated considerably about the propriety and scope of judicial review).

91. Rakove treats Madison’s comment about judges as a minor point that should not distract from Madison’s general thesis about the practical benefits of enumeration. See RAKOVE, *supra* note 2, at 335. This Essay fully agrees with Rakove’s depiction of Madison’s general thesis, but it offers different interpretations of his comment about judging and, in turn, of the relationship between that comment and his broader thesis. Whereas Rakove treats the minor point as a positivist throwaway line that “came from Jefferson,” *id.*, this Essay argues that Madison subtly transformed the argument to *avoid* any positivist implication and, in the same fell swoop, to *reinforce* his broader thesis about the salutary effects of enumeration. But while Rakove has not described Madison’s June 8 speech in this way, my thesis aligns with Rakove’s reading of other evidence relating to Madison’s views about judicial review. See Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1049 (1997) (“Madison’s analysis of the limits of judicial power was essentially a political one, and it followed directly from the critique of the inherent factiousness and parochialism of state politics that drove his constitutional theory.”); *id.* at 1057 (“Madison . . . obviously believed that the political weakness of the courts would impair their capacity to do justice when they later acted in a properly judicial capacity.”).

92. See, e.g., Randy Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 26 (2006) (“Madison’s prescient statement about the practical importance of enumerating rights says nothing about how unenumerated rights ought to be treated, much less that they are to be judicially unenforceable.”).

93. See, e.g., Ryan Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 515 (2011) (“Although this passage does not necessarily support the proposition that rights omitted from the enumeration were expected to be legally unenforceable, it does suggest the possibility that Madison . . . recognized that enumerating rights might place those rights on a different legal footing than unenumerated rights by providing judges with a textual foundation for extending protection to such rights.”). Along these lines, Mark Graber cites Madison’s statement for the idea that “enumeration facilitated judicial protection for the specified rights,” Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. LAW 357, 393 (2007) (emphasis added), but Graber also refers to Madison’s speech in a more legalistic way. See *id.* at 361 (“[T]he conclusion might follow that the Constitution protected only those rights enumerated in the text, rights best protected by the federal judiciary.”); *id.* at 379 (“Enumerated rights would enable the federal judiciary to protect the people’s liberties.”); see also DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT 197–98, 208,

Departing from these earlier studies, this Essay argues that Madison was asserting neither the sufficiency nor the necessity of enumeration for the judicial enforcement of rights against contrary legislation. These arguments are developed in turn.

A. *The Sufficiency of Enumeration*

Madison probably joined the First Congress without a committed position about the legal significance of enumeration. Just the previous year, in fact, he had revealed a deep ambivalence about judicial review. “Courts are generally the last in making their decision,” he remarked privately to a colleague, so “it results to them, by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Dept paramount in fact to the Legislature, which was never intended, and can never be proper.”⁹⁴ And just a week after introducing the Bill of Rights, Madison gave a speech in which he clearly denied the supremacy of judges in fixing constitutional meaning. Instead, he “suppose[d],” constitutional decisions “may be made with the most advantage by the legislature itself,” at least when acting in good faith.⁹⁵ And, as we have seen, his primary arguments for enumerating rights had nothing to do with courts or judging.⁹⁶ Madison thus was extraordinarily unlikely to champion highly controversial claims of judicial power.

Obviously, though, Madison accepted *some* judicial enforcement of enumerated rights against contrary legislation. He was, after all, talking about “tribunals of justice” protecting against “encroachment upon rights expressly stipulated for in the constitution.”⁹⁷ And, as we have seen, the Founders widely accepted the judicial enforceability of fundamental positive rights.⁹⁸ But perhaps, with a Federalist audience that largely accepted judicial enforcement of *customary* fundamental positive rights,⁹⁹ Madison was focusing on the effects of enumeration on judicial psychology and judicial politics, not judicial duty.

Indeed, a careful examination of the newspaper report of Madison’s June 8 speech supports this conclusion. He began, after all, by observing that enumeration, while not necessary, would nonetheless have “a salutary effect.”¹⁰⁰ And each of Madison’s subsequent statements about judicial power fit with this theme. His assertions that courts would “*consider themselves* in a peculiar

210–11 (2009) (framing Madison’s comments on enumeration of rights as functional but then insisting on giving enumerated rights legal effect).

94. James Madison, *Observations on the “Draught of a Constitution for Virginia,”* in 11 PAPERS OF JAMES MADISON, *supra* note 6, at 285, 293.

95. James Madison, Removal Power of the President (June 17, 1789), in 12 PAPERS OF JAMES MADISON, *supra* note 1, at 232, 239.

96. *See supra* note 2.

97. Madison, *supra* note 1, at 207.

98. *See supra* Part I.A.

99. *See* KRAMER, *supra* note 21, at 97.

100. Madison, *supra* note 1, at 206.

manner the guardians” of enumerated rights and “be *naturally led* to resist every encroachment” explicitly speak to judicial psychology, not legal obligation.¹⁰¹ Enumeration, in short, could bolster the willingness of judges to risk a confrontation with politicians.¹⁰² Judges might still encounter political resistance, of course, but at least they would know that they could hold up the constitutional text—the people’s own instructions—as their warrant.

Madison’s claim (or, perhaps, reporter Thomas Lloyd’s embellishment) that courts would form “an impenetrable bulwark against every assumption of power in the legislative or executive” is more opaque but probably addressed judicial politics. Not only would judges “consider themselves” a guardian of rights; their guardianship of those rights would more likely be “impenetrable.” In any event, this passage deserves less attention. The Founders often spoke in a similar grandiose way about juries and press freedom, but this eighteenth-century rhetoric should not be understood literally. (Madison’s subsequent praise of state legislatures as “able to resist with more effect every assumption of power than any other power on earth can do” reflects the same rhetorical flair.)

In sum, Madison was not making an argument about legal duties. Still, he may have implicitly taken for granted that enumerating positive rights was sufficient for their judicial enforcement. That idea, after all, was widely accepted by his Federalist audience.¹⁰³ Thus, if Madison assumed judicial enforce-

101. *Id.* at 207 (emphases added).

102. For concerns about judicial refusals to follow binding law, see James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES 345, 352 (Robert A. Rutland & William M. E. Rachal eds., 1975) (“[T]he acts of Congress . . . are tho’ nominally authoritative, in fact recommendatory only. . . . Whenever a law of a State happens to be repugnant to an act of Congress . . . [and] the question must be decided by the Tribunals of the State, they will be most likely to lean on the side of the State.”); Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in PAPERS OF JAMES MADISON, *supra* at 368, 370 (“If the judges in the last resort depend on the States [and] are bound by their oaths to them and not to the Union, the intention of the law and the interests of the nation may be defeated by the obsequiousness of the Tribunals to the policy or prejudices of the States.”); see also Rakove, *Origins of Judicial Review*, *supra* note 91, at 1040, 1048 (“Perhaps the crucial matter is not merely for courts to review legislation, but to summon the intestinal fortitude to void a constitutionally doubtful act What made the institution of judicial review problematic in their original assessments was not its constitutional legitimacy, but rather doubts about its capacity to withstand the buffeting of either state- or national-oriented political forces.”). Just a week after his bill of rights speech, Madison may have expressed doubts “that judges would muster the fortitude to intervene in a highly charged [constitutional] dispute” that turned on unenumerated constitutional principles. Rakove, *supra* note 89, at 1532. It is worth noting, however, that Madison’s concern over whether “they” would “decide so calmly as at this time” was perhaps a reference to Senators, not to judges. See James Madison, *Removal Power of the President* (June 18, 1789), in 12 PAPERS OF JAMES MADISON, *supra* note 1, at 244, 244–45 (“If we leave the constitution to take this course, it can never be expounded until the president shall think it expedient to exercise the right of removal, if he supposes he has it; then the senate may be induced to set up their pretensions: And will they decide so calmly as at this time, when no important officer in any of the great departments is appointed to influence their judgments? The imagination of no member here, or of the senate, or of the president himself, is heated or disturbed by faction: If ever a proper moment for decision should offer, it must be one like the present.”).

103. See *supra* Part I.B. and Part II.

ment of enumerated *positive* rights, like the guarantee of a jury trial, that assumption was uncontroversial.

Nonetheless, Madison was hardly suggesting that *every* enumerated right would be judicially enforceable against contrary legislation. Consider, for instance, the first proposal in Madison's list of amendments:

That . . . all power is originally vested in, and consequently derived from the people.

That government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

That the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution.¹⁰⁴

Madison planned for these clauses to appear in the preamble.¹⁰⁵ They “may be called,” he explained, “a bill of rights.”¹⁰⁶

Madison's first proposal clearly acknowledged the inalienable natural rights of life, liberty, and property, as well as the “right of revolution” asserted by the rebelling American colonists.¹⁰⁷ Yet nobody at the Founding claimed that these rights were judicially enforceable, at least not in the conventional sense. Natural rights, as we have seen, were judicially enforceable only insofar as judges voided or equitably construed statutes in the face of manifest legislative disregard for the public interest. And even that contested power was derived from general constitutional principles, not the enumeration of rights.

Consider also the First Amendment right of free exercise. This provision recognized a firm limit to federal power—namely, the unconstitutionality of religious persecution.¹⁰⁸ But past this core protection, the Founders did not suggest that judges had primary authority to determine the proper bounds of natural liberty when governmental powers collided with religious concerns in

104. Madison, *supra* note 1, at 200.

105. *Id.* Two months later, Madison defended the placement of his natural-rights proposal “*in the Constitution . . . in this place [i.e., the preamble],*” 1 ANNALS OF CONG., *supra* note 38, at 719 (remarks of James Madison) (emphasis added), which would seem to suggest that these proposed rights would be “*incorporated into the constitution.*” Madison, *supra* note 1, at 206–07 (emphasis added). Others took a different view but without particular reference to judicial review. *See* 1 ANNALS OF CONG., *supra* note 38, at 718 (remarks of Thomas Tudor Tucker) (a preamble is “no part of the Constitution”); *id.* (remarks of Rep. John Page) (same).

106. Madison, *supra* note 1, at 203.

107. *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment outside Article V*, 94 COLUM. L. REV. 457, 476 (1994) (noting the historical connection between popular sovereignty and the right of revolution).

108. *See* Philip Hamburger, *More is Less*, 90 VA. L. REV. 835, 838–57 (2004).

other ways.¹⁰⁹ At the state level, for instance, religious freedom was mentioned in nearly every constitution or bill of rights, but judges consistently deferred to legislative or customary judgments regarding the propriety of blasphemy laws and the availability of exemptions when individuals had religious scruples.¹¹⁰ These conflicts still *implicated* natural rights, but it was not up to judges to determine the degree to which natural liberty should be curtailed in the public interest.

In this context, Madison's audience would not have understood his comments as implying, much less singlehandedly accomplishing, a radical transformation in the nature and scope of judicial authority. Rather, if Madison was suggesting that enumeration was a *sufficient* condition for judicial enforcement, his position undoubtedly was limited to *positive* rights, including longstanding positive-law protections for natural liberty.¹¹¹ On that issue, his audience would have broadly agreed.

109. Relying on Madison's June 8 speech, Michael McConnell concludes: "Once the people empowered the courts to enforce the boundary between individual rights and the magistrate's power, they entrusted the courts with a responsibility that prior to 1789 had been exercised only by the legislature." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1445 (1990). Along similar lines, David Bogen concludes that "freedom of speech meant that restrictions on speech are impermissible unless necessary to accomplish a legitimate function of government, and that the courts rather than the legislature should ultimately determine that necessity." Bogen, *supra* note 3, at 458. But Madison, as this Essay argues, was not making a sweeping endorsement of judicial power to determine the proper scope of natural liberty. Not surprisingly, then, there is strikingly little evidence of judicially enforceable religious exemptions at the Founding, see Wesley J. Campbell, Note, *A New Approach to Nineteenth-Century Religious Exemption Cases*, 63 STAN. L. REV. 973, 987 (2011), just as there is strikingly little evidence of judicially enforceable protection for expressive freedom outside the protection for well-intentioned statements of one's thoughts, see generally Campbell, *supra* note 24. At the same time, however, Founding Era evidence disproves a talismanic acceptance of neutral, generally applicable laws. See, e.g., Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 819, 838 (1998) ("[W]hen the Continental Congress, for one example, stated that imposing military conscription on 'people, who, from religious principles, cannot bear arms in any case' would be an act of 'violence to their consciences,' this tells us something about the understood meaning of the rights of conscience . . ."); see also Wesley J. Campbell, *Religious Neutrality in the Early Republic*, 24 REGENT U. L. REV. 311, 316 (2012) ("The Free Exercise Clause guaranteed a natural, unalienable right of religious freedom—not a right to governmental neutrality."). In my view, Founding Era evidence militates against robust judicial enforcement of religious exemptions but, at the same time, reinforces that incidental restrictions of religious practice or religious conscience *implicated* the natural right of religious freedom, just as every law restricting human actions implicated the natural right of liberty. See, e.g., St. George Tucker, *On the State of Slavery in Virginia* (1796), in *VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS* 402, 407 (1999) ("[W]henever [natural] liberty is, by the laws of the state, further restrained than is necessary and expedient for the general advantage, a state of civil slavery commences immediately . . ."). For articles with pertinent evidence, see, e.g., Philip Hamburger, *Religious Freedom in Philadelphia*, 54 EMORY L.J. 1603 (2005); Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083 (2008).

110. See Campbell, *New Approach*, *supra* note 109, at 989–98 (discussing religious-exemption cases from the early 1800s).

111. See generally Campbell, *supra* note 24 (discussing the relationship between natural rights and positive rights).

B. The Necessity of Enumeration

But what about the *necessity* of enumeration for judicial enforcement? Even if enumeration was sometimes but not always sufficient to trigger judicial enforcement of rights against contrary legislation, was Madison arguing that judicial enforceability was only possible when a right was specifically included in the Constitution?

Madison's drafting and defense of the Bill of Rights demonstrates his desire to remain neutral on this issue.¹¹² First, as mentioned earlier, Madison explicitly "admit[ted] the force" of the conventional Federalist view that "a bill of rights is not necessary," and he framed his comments about judging only in terms of the "salutary effect" that enumeration might have "to a certain degree."¹¹³ This was hardly language that suggested legal necessity. And in the three clauses about judicial enforcement, Madison never expressly denied that unenumerated rights were judicially enforceable.¹¹⁴ To be sure, he never took the opposite position either—that some unenumerated rights were *already* enforceable. But that is exactly my point: Madison was not taking a public position on this contested issue.

The context of Madison's speech reinforces this conclusion. Madison was trying to convince his Federalist colleagues, most of whom viewed the enumeration of rights as unnecessary, that they should write them down anyway. Viewed from this standpoint, it is highly unlikely that he was arguing from the opposite premise—that enumeration was *essential*. If that is what he meant, the argument was a loser.

Madison's desire not to take a position on the necessity of enumeration is further reflected in his eleventh proposal:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.¹¹⁵

112. Madison's personal view on the necessity of enumeration is unknown. Given his cautious attitude toward judicial review, one can imagine him privately supporting the necessity of enumeration. See *supra* notes 90, 94, and 95 and accompanying text; see also 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 19, at 440 ("Is not that already done by the prohibition of ex post facto laws, which will oblige the Judges to declare such interferences null & void."); cf. *supra* note 89 (mentioning Madison's correspondence with Jefferson). On the other hand, Madison belonged to an elite political class that, steeped in the tradition of customary constitutionalism, widely rejected the notion that enumeration was essential to the judicial enforcement of rights. See *supra* Part I.B. and Part II.

113. Madison, *supra* note 1, at 206. At another point, he described his list of rights "either as actual limitations of such powers, or as inserted merely for greater caution," carefully avoiding offending either side. *Id.* at 202.

114. Accord Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 20 (1988).

115. 1 ANNALS OF CONG., *supra* note 38, at 435.

This provision, framed as a rule of construction, answered leading objections to the Constitution's omission of rights. "It has been objected . . . against a bill of rights," Madison explained, "that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration," rendering them "insecure."¹¹⁶ For instance, by enumerating only a criminal jury right, Federal Farmer had warned, the Framers had "strongly implied" that the right to a civil jury would not "be regarded in the federal administration as fundamental."¹¹⁷

Madison's proposed constructive rule (which, after revisions, became the Ninth Amendment) responded to this concern by guaranteeing that non-enumeration was not a basis for denying the "just importance" of unenumerated rights. This language carefully avoided taking a position on the potential "fundamental" status of unenumerated rights. Did Madison agree, for instance, with Federal Farmer's suggestion during the ratification debates that it was "doubtful" whether Americans could claim fundamental positive rights "under immemorial usage"? Neither Madison's proposed constructive rule nor his explanatory speech supply an answer. Rather, all that the Ninth Amendment provides is that unenumerated rights remain in whatever position they were in prior to enumeration.¹¹⁸

CONCLUSION

Coming from a culture where judicial power is taken for granted, we have a tendency to forget that "the Founders often spoke in terms of *practical* authority rather than *constitutional* authority."¹¹⁹ Maybe, in our lawyerly way, we have missed Madison's effort to facilitate rights enforcement by buttressing a legal authority that many thought already existed. Rather than supporting the necessity or sufficiency of enumeration for the judicial enforcement of rights, Madison was making a more practical point. The judiciary, as Hamilton famously remarked, had "neither Force nor Will, but merely judgment."¹²⁰ The least that

116. *Id.* at 439.

117. *Federal Farmer No. 16*, *supra* note 40, at 1056. Notably, these arguments focused on fundamental positive rights. *Id.* at 1057–58; *Brutus No. 2* (1787), *reprinted in* 19 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 154, 156–59 (John P. Kaminski et al. eds., 2003); Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* 12 *THE PAPERS OF THOMAS JEFFERSON* 438, 440 (Julian P. Boyd ed., 1955). A notable exception was the freedom of conscience, which was a natural right, but even that right had enjoyed positive-law protection in some form ever since the Toleration Act.

118. *Accord* KURT T. LASH, *THE LOST HISTORY OF THE NINTH AMENDMENT* 82 (2009) ("*In sum*: The text of the Ninth Amendment prevents interpretations of enumerated rights that negatively affect the unenumerated retained rights of the people. . . . [T]he fact of enumeration [cannot be] relied upon to suggest the necessity or superiority of enumeration.").

119. *See* Campbell, *supra* note 4, at 1178 n.301 (making this point in the context of statements about governmental power more generally).

120. *THE FEDERALIST NO. 78*, *supra* note 16, at 523 (Alexander Hamilton).

the First Congress could do was provide judges with a textual basis for exercising their “awful” duty.¹²¹

121. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (opinion of Iredell, J.) (“[A]s the authority to declare [a statute] void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case.”); Edmund Pendleton, *Pendleton’s Account of “The Case of the Prisoners,”* in 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON, 1734–1803, at 417 (David John Mays ed., 1967) (“But how far this Court in which it has been properly said the Judiciary Powers of the State are concentrated, can go in declaring an Act of the Legislature void, because it is repugnant to the Constitution, without exercising the Power of Legislation, from which they are restrained by the same Constitution? is a deep, important, and, I will add, an awful question.”); see KRAMER, *supra* note 21, at 64 (“Early proponents of judicial review were quite self-conscious in recognizing the awful nature of what they were doing: ‘awful’ in the eighteenth century sense of something full of awe.”).